(10)

No. 90-634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 17, 1990
CERTIORARI GRANTED DECEMBER 10, 1990

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

INDEX TO JOINT APPENDIX

Pursuant to Rule 26.1, the following items are not reproduced herein, having previously been reproduced in the Appendix to Petition for Certiorari filed on October 17, 1990, at the referenced pages:

Chronological List of Relevant Docket Entries

December 23, 1982—Summons and complaint filed in Hennepin County District Court, State of Minnesota.

January 5, 1983—Defendant Cowles Media Company's answer filed.

January 17, 1983—Defendant Northwest Publications, Inc.'s answer filed.

February 25, 1985—Cowles Media Company's answer to amended complaint filed.

February 27, 1985—Northwest Publications, Inc.'s answer to amended complaint filed.

March 22, 1985—Amended complaint filed.

February 6, 1987—Hearing on defendants' motion for summary judgment.

June 19, 1987—Order and memorandum denying motion for summary judgment filed.

July 22, 1988—Date of jury's special verdict.

August 12, 1988—Findings of fact, conclusions of law, and order for judgment filed.

August 22, 1988—Hearing on defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

November 19, 1988—Order and memorandum denying defendants' motions for judgment notwithstanding the verdict or a new trial filed.

December 9, 1988—Judgment of District Court entered.

June 12, 1989—Oral argument before Minnesota Court of Appeals on defendants' notices of appeal.

September 5, 1989—Opinion of Minnesota Court of Appeals filed, affirming in part and reversing in part judgment of Hennepin County District Court.

October 31, 1989—Order of Minnesota Supreme Court filed, granting petitions of all parties for further review of decision of Minnesota Court of Appeals.

March 13, 1990—Oral argument before Minnesota Supreme Court.

July 20, 1990—Opinion of Minnesota Supreme Court filed, affirming in part and reversing in part decision of Minnesota Court of Appeals.

October 17, 1990—Petition for writ of certiorari docketed in United States Supreme Court.

December 10, 1990—Order of United States Supreme Court entered, granting petition for writ of certiorari, limited to question 1 presented by the petition.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

CASE TYPE: CONTRACT
DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

DAN COHEN,

Plaintiff

vs.

COWLES MEDIA COMPANY, a corporation,
d/b/a MINNEAPOLIS STAR and TRIBUNE COMPANY
and NORTHWEST PUBLICATIONS, INC.,
a corporation,

Defendants.

Court File No. 798806

TRIAL EXHIBITS*

PLAINTIFF'S EXHIBIT NO. 21
7-6-88

(Reproduced from Star Tribune, October 28, 1982)

Minneapolis STAR and Tribune 1A Metro Thursday

Marlene Johnson arrests disclosed by Whitney ally

By Staff Writer

Court records showing that DFL lieutenant governor candidate Marlene Johnson was convicted more than 12 years ago

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* The news articles involved in this case were introduced at trial as Plaintiff's Exhibits 21, 24, 25 and 39, and are reproduced typographically in the Joint Appendix at pages 1-12. Fifteen photocopies of the news articles themselves, as they appeared at pages A-1 through 5 of the Joint Appendix presented to the Minnesota Supreme Court, have been lodged with the Clerk of this Court.

on a misdemeanor charge of shoplifting were given to reporters Wednesday by Dan Cohen, a friend and political associate of IR gubernatorial candidate Wheelock Whitney.

The conviction, which Johnson said stemmed from her forgetting to pay for $6 worth of sewing items, was later vacated.

Cohen took copies of the court records to several news organizations, along with records showing that Johnson had been arrested for unlawful assembly shortly before the shoplifting charge. That case was later dropped.

Both Whitney and his campaign manager, Jann Olsten, said Cohen had acted without knowledge or permission of the candidate or his staff. Both said such information about a candidate's past ought to be available to the public before an election.

Olsten acknowledged that he learned Tuesday about Johnson's conviction. Whitney, on a campaign tour in northern Minnesota, said last night from Moorhead that "the first time I heard about it was this afternoon on the bus."

He added, "I don't recall talking to Dan Cohen in the last two months. I don't know how Cohen got the information about Johnson—he must have looked it up in the records."

Johnson, 36, said former Gov. Rudy Perpich knew about the incident when he chose her as his running mate, and that "we both agreed it didn't have any bearing on my qualifications today to be lieutenant governor."

DFLers, including Perpich, were quick to accuse Whitney's campaign of 11th-hour muckraking.

"This is an indication of the absolute desperation of the other side," said Perpich campaign manager Eldon Brustuen. "They're trying to find more to attack us on — their attacks so far haven't worked."

Perpich said he is proud of his running mate and has "absolute confidence" in her. "In the last 12 years, she's been in

business, a taxpayer, a good citizen, a very meaningful contributor to society . . . I just feel Minnesotans judge people on those things," he said.

He said he didn't know whether the revelations will harm the Perpich-Johnson campaign. Of its potential impact on his campaign, Whitney said, "I don't care if it could or couldn't backfire on my campaign . . . but I certainly think it's legitimate information."

Johnson's first arrest occurred in September 1969, when she and a half-dozen other Urban League protesters were arrested at a sewer construction site on Dayton Av. in St. Paul for refusing to leave a construction ditch. They were protesting the city's alleged failure to hire minority workers on construction projects.

The three counts of unlawful assembly against Johnson were dismissed on April 27, 1970 — the day her father, Buford Johnson of Braham, Minn., died.

The death of her father, whom she refers to in campaign speeches as a major influence in her life, left her "very upset," she said yesterday.

"I wasn't myself for quite a while. Within a month I lost 20 pounds, I got my first-ever speeding ticket, and, when I forgot to pay for $6 worth of buttons and sewing materials at the Sears store on Rice St., I was arrested."

The records indicate that she was arrested on May 25 and convicted on June 3, 1970. Sentencing was deferred until Feb. 6, 1971, when the conviction was vacated — a common practice in cases involving first offenders.

"The judge concluded that the situation did not reflect my past or what was expected to be my future," Johnson said. Because the conviction was vacated, she has no criminal record, she said.

Johnson heads the St. Paul advertising agency Split Infinitive, Inc., which she founded in 1970. Her campaign for lieutenant governor is her first bid for elective office.

Johnson has been a leader in small-business and women's organizations, in recent years heading the National Association of Women Business Owners, the DFL Small Business Task Force, the Minnesota delegation to the 1980 White House Conference on Small Business and the Minnesota Women's Political Caucus. In 1980, she won the St. Paul Jaycees' Distinguished Service Award for Community Service.

Cohen said the issue he hoped to raise by releasing the records "isn't whether Ms. Johnson has been convicted, but whether she tried to conceal it from the public."

Cohen, a former Independent-Republican alderman in Minneapolis who this year ran unsuccessfully for the Hennepin County Board, noted that when he was arrested for scalping a ticket at the Kentucky Derby three years ago, he publicized the incident immediately.

Cohen is an advertising executive with Martin-Williams, Inc., and assisted Whitney with production of some TV ads. He is not on the campaign payroll and does not sit on its steering committee. He and Whitney have been friends since 1957, when Cohen's father, the late Merrill Cohen, hired Whitney at J.M. Dain Co., now Dain Bosworth, Inc., the investment firm Whitney headed during the 1960s.

"The voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie," he said.

A check-out log of court records in the St. Paul Municipal Court archives indicates that files on the Johnson cases have been checked out only once in 1982 — on Tuesday, by Gary Flakne, former Hennepin County attorney and a former IR legislator.

Flakne said yesterday he heard "quite a while ago . . . through the grapevine" that Johnson had a criminal record. He said he could not say who gave him the information, or why he waited until this week to obtain copies of the documents.

A clerk in the archives, Robert Granger, said he remembers one previous inquiry about Johnson's records, several months ago. It may have been a telephone inquiry, Granger said, because it does not appear on the log.

Olsten said he first became aware of Johnson's conviction Tuesday, after Whitney's running mate, Lauris Krenik, was interviewed by Dick Pomerantz, host of a talk show on KSTP-AM radio.

Pomerantz, said yesterday that he has known for several months about the shoplifting case. He said he asked Krenik, "Suppose there was something in somebody's background 12 or 15 years ago, petty theft . . . Should that person be judged on that?"

He denied mentioning Johnson's name to Krenik. Olsten, however, said that Krenik left the broadcast with the understanding that Johnson had been convicted of petty theft.

Whitney said that when he heard of the matter yesterday, "I said, 'Where in the hell did that come from?' I understood it came from Dick Pomerantz."

Olsten said that as of yesterday afternoon, the Whitney campaign had no plans to mention Johnson's record in speeches or advertisements in the final week of the campaign.

"Certainly, a person's character and integrity are things people ought to look at when they vote for the second-highest office in the state," Olsten said. "I wouldn't presume to tell voters whether I think this is relevant to the campaign — I'd leave that up to them."

Whitney said, "I honestly think it's a legitimate piece of information and if it happened to my running mate, well, then people ought to know. Your past is part of your history. An accumulation of facts. It's absolutely legitimate to talk about."

PLAINTIFF'S EXHIBIT NO. 24
7-6-88

(Reproduced from St. Paul Pioneer Press, October 28, 1982)

St. Paul Pioneer Press Thursday, October 28, 1982 16D

Vacated conviction called 'irrelevant'

By Bill Salisbury
Staff Writer

A prominent Independent-Republican slipped copies of court records to reporters Wednesday showing that Marlene Johnson, DFL candidate for lieutenant governor, was convicted of shoplifting $6 worth sewing supplies 12 years ago — a conviction that has been expunged from her record.

Johnson confirmed the report and said it is "irrelevant" to the campaign. She said she told former Gov. Rudy Perpich about the incident before he selected her as his running mate.

"It's a last-minute smear campaign," Johnson said, charging that I-R gubernatorial candidate Wheelock Whitney was behind the revelation.

"Wheelock knew nothing about it," Whitney campaign manager Jann Olsten said. "It's a predictable response. If I were in her position, I'd try to shift the attention on someone else, too."

Perpich gave Johnson an "absolute" vote of confidence. "She told me about it; she told me about the circumstances,

and I just judged her on what I believe she can do as lieutenant governor," he said in a telephone interview from Winona.

Asked what political damage the revelation might have, Perpich replied, "I don't know. I just feel that Minnesotans judge people by what they do in society, and I believe that she has been a very meaningful contributor to society."

Johnson said the incident occurred at a time when she was distraught over the recent death of her father.

She said that on May 25, 1970, she walked out of the Sears store, 425 Rice St., with $6 worth of buttons and other sewing materials" without paying for it. She was arrested.

"I was very close to my father and was upset by his death," she said. "I was under stress — I had lost about 20 pounds — and I also got my first speeding ticket at about the same time."

Court records show Johnson was found guilty of petty theft on June 3, 1970, but that the conviction was vacated Feb. 6, 1971, without a sentence being imposed. Johnson said this means that "I do not have a criminal record."

She also confirmed a court record that she was arrested in 1969 for "unlawful assembly" for participating in a civil rights protest demonstration. The charge was dropped before the case went to trial.

Dan Cohen, a Minneapolis advertising and public relations consultant, gave the court records to at least three reporters, but asked that his name not be used. Cohen, a former I-R alderman who has run unsuccessfully for mayor and county commissioner, said he was delivering the records for another person, whom he declined to identify.

Olsten said Whitney knows Cohen, but Cohen is not involved in the Whitney campaign.

"We were not behind bringing this to light," Olsten said. "But regardless of how it became public, it goes to the honesty and moral character of the person involved."

Johnson said she was informed that the records were slipped to reporters by "someone close to the Whitney campaign." She declined to identify her source.

Johnson, 36, is the first woman chosen by a major party as its lieutenant governor candidate. She owns Split Infinitive, a St. Paul advertising and public relations firm.

PLAINTIFF'S EXHIBIT NO. 25
7-6-88

(Reproduced from St. Paul Pioneer Press, October 28, 1982)

Metro/Region D

Sloppy teen
She drives mom crazy
Dear Abby, Page 5D

Hope chests
A hopeless tradition?
Erma Bombeck, Page 5D

St. Paul Pioneer Press — Classified Ads in this section — Thursday, October 28, 1982

Perpich running mate arrested in petty theft case in '70

By Bill Salisbury
Staff Writer

Marlene Johnson, the DFL candidate for lieutenant governor, was convicted 12 years ago of shoplifting $6 worth of sewing supplies.

Court records concerning the conviction — which has been expunged from her record — were given to reporters Wednesday by a prominent Independent-Republican.

Johnson confirmed the report and said it is "irrelevant" to the campaign. She said she told former Gov. Rudy Perpich about the incident before he selected her as his running mate.

"It's a last-minute smear campaign," Johnson said, charging that I-R gubernatorial candidate Wheelock Whitney was behind the revelation.

"Wheelock knew nothing about it," Whitney campaign manager Jann Olsten said. "It's a predictable response. If I were

in her position. I'd try to shift the attention on someone else, too."

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Asked what political damage the revelation might have, Perpich replied, "I don't know. I just feel that Minnesotans judge people by what they do in society, and I believe that she has been a very meaningful contributor to society."

Johnson said the incident occurred at a time when she was distraught over the recent death of her father.

She said that on May 25, 1970, she walked out of the Sears store, 425 Rice St., with "$6 worth of buttons and other sewing materials" without paying for it. She was arrested.

"I was very close to my father and was upset by his death," she said. "I was under stress — I had lost about 20 pounds — and I also got my first speeding ticket at about the same time."

Court records show Johnson was found guilty of petty theft on June 3, 1970, but that the conviction was vacated Feb. 6, 1971, without a sentence being imposed. Johnson said this means that "I do not have a criminal record."

She also confirmed a court record that she was arrested in 1969 for "unlawful assembly" for participating in a civil rights protest demonstration. The charge was dropped before the case went to trial.

Dan Cohen, a Minneapolis advertising and public relations consultant, gave the court records to at least three reporters, but asked that his name not be used. Cohen, a former I-R alderman who has run unsuccessfully for mayor and county commissioner, said he was delivering the records for another person, whom he declined to identify.

"The issue isn't whether Miss Johnson has been convicted of a misdemeanor, but whether she concealed it," Cohen said.

". . . every day that Miss Johnson failed to reveal her conviction and Mr. Perpich knew about it, they were living a lie." Cohen is not involved in the Whitney campaign at present, but was employed by Whitney as an advertising consultant for a time early this year, according to Olsten. He insisted Whitney knew nothing of Cohen's plan to release the court records.

"We were not behind bringing this to light." Olsten said. "But regardless of how it became public, it goes to the honesty and moral character of the person involved."

Johnson said she was informed that the records were slipped to reporters by "someone close to the Whitney campaign." She declined to identify her source.

Johnson, the first woman chosen by a major party as its lieutenant governor candidate in Minnesota, owns Split Infinitive, a St. Paul advertising and public relations firm.

PLAINTIFF'S EXHIBIT NO. 39
7-7-88

(Reproduced from Duluth News-Tribune & Herald, October 28, 1982)

DFL candidate arrested twice, records show

ST. PAUL (AP) — Court records showing DFL lieutenant governor candidate Marlene Johnson was arrested a dozen years ago for unlawful assembly and shoplifting were slipped to reporters Wednesday.

Johnson confirmed the information. She said both cases were dismissed or vacated and have no bearing on the campaign. Johnson said the information was given to former Gov. Rudy Perpich before she was chosen as his running mate.

She called it a "last minute smear" and blamed the tactic on the Independent-Republican candidate for governor, Wheelock Whitney.

Reached on the campaign trail in Fergus Falls, Whitney press aide Tom Mason said, "It wasn't us. We did not do it."

Perpich said by telephone from Winona that he has full confidence in Johnson.

Johnson, 36, said one case involved a protest over the alleged failure to hire minority workers for St. Paul city construction projects.

The count of unlawful assembly was dismissed in Ramsey Municipal Court on April 27, 1970.

Johnson said the second arrest, on May 26, 1970, came when she was distraught over the death of her father. She said she walked out of a Sears store with "six dollars worth of buttons

and sewing materials" without paying for it, and was arrested for shoplifting.

The shoplifting charge resulted in a misdemeanor conviction in June 1970. Sentencing was deferred. The conviction was vacated in February 1971.

(Caption omitted in printing)

DAN COHEN V. COWLES MEDIA COMPANY

Oral Argument Before the

Minnesota Supreme Court

March 13, 1990

(NOTE: The following unofficial transcript of oral argument before the Minnesota Supreme Court was prepared by counsel for respondent Cowles Media Company from a tape recording maintained by that court. Counsel for all parties received a copy of this transcript prior to its inclusion herein. A copy of the tape recording will be provided to this Court upon request.)

Popovich, C.J.: Mr. Borger, are you going to lead off?

Borger: Yes I am, your Honor.

Popovich, C.J.: I understand you are reserving five minutes for your rebuttal and Mr. Hannah is reserving five minutes also.

Borger: Yes. May it please the Court, my name is John Borger and I am here representing Cowles Media Company, publisher of the Star Tribune newspaper. Paul Hannah is also an appellant, representing appellant Northwest Publications, Incorporated, publisher of the St. Paul Pioneer Press. This case arises because a news source who was promised confidentiality by reporters from two newspapers complains because the editors at those newspapers decided to disclose his identity. The issues fall into three categories. I will be dealing with the contract issues of whether the oral discussions between the reporters and Mr. Cohen, the source, constitute a contract and whether, in this particular instance, the source suffered damages as a result of the disclosure of his identity, which damages are recoverable in contract. Mr. Hannah will be dealing with the misrepresentation issues of whether the evidence at

trial is sufficient to support a jury finding of misrepresentation and consequently an award of punitive damages. And I will also be dealing with the public policy and constitutional law issues of whether the theories of breach of contract and misrepresentation can be used to impose damages upon newspapers for publishing accurate newsworthy information about political affairs.

The facts in this case go back to the final days of the 1982 gubernatorial campaign. Mr. Cohen and other supporters of Independent Republican candidate Wheelock Whitney obtained copies of arrest records from 1970 having to do with some misdemeanor arrests of Marlene Johnson, who was then the Lieutenant Governor candidate and subsequently won that election. Mr. Cohen and his colleagues devised a plan which Judge Crippen below described as a "political scheme to broadcast a political attack, but at the same time to evade responsibility for the act." Mr. Cohen separately approached four reporters and obtained promises of confidentiality if he gave them information about the gubernatorial campaign. The four news organizations made different judgments as to how they handled that after they had obtained the information. Two, the St. Paul paper and Minneapolis paper, decided that Mr. Cohen had to be named notwithstanding that promise in order to give their readers the entire picture. Mr. Cohen, the day this newspaper article ran, was discharged by his public relations firm and Mr. Cohen then sued the newspapers for breach of contract and misrepresentation. The jury, which was not allowed to consider any First Amendment defenses, awarded $200,000.00 in compensatory damages and a total of $500,000.00 in punitive damages. The Court of Appeals last year affirmed the contract award but reversed the punitive award because as a matter of law on these facts there was no misrepresentation. All parties have appealed.

Your Honors, I submit that the contract award in this case must fall just as the misrepresentation claim fell and must fall as a matter of fact, as a matter of contract law and as a matter of state and federal constitutional law under the First Amendment to the United States Constitution and Article 1, § 3 of the Minnesota Constitution. The central error which permeates this entire case is that the court below perceived no constitutional dimension to the case. Yet contract theory, under these circumstances, interferes with three First Amendment rights of the press. It interferes with news gathering, because under this theory the court and jury will second-guess the manner in which reporters deal with their sources. It interferes with the editing process, because under this theory, the courts and juries will decide what information the editors should have left out and what they should have included in the story. Finally, it interferes with the publication of truthful, newsworthy information and it suppresses or punishes that publication.

The Court of Appeals analysis below, we submit, should be rejected because it is overly broad and deeply flawed, encouraging disgruntled sources to seek court intervention in all manner of alleged promises by the press. The first leg of the Court of Appeals analysis below was that there was no state action in enforcing contracts. I think the error in that can be demonstrated by comparing the United States Supreme Court decision of *Barrows v. Jackson*, in which the court said that once state sanctions are involved there is state action because it is no longer the party's voluntary choice to abide by an agreement, but the State's choice that the party observe the agreement or suffer damages. Contrast that, if you will, with the Court of Appeals' language below emphasizing this point, perhaps unintentionally, in which they describe large

damage awards as the most effective incentive for publishers to honor promises of confidentiality. The second leg of the Court of Appeals analysis was waiver. This is a factual issue which was not presented at trial. Even if it had been, the manner in which the Court of Appeals analyzed it gives undue weight to an oral representation of simply saying, "okay"; the reporter says "okay" to a source who asks for confidentiality. In contrast, other courts from the United States Supreme Court to Circuit Courts of the United States, have held that even written employment contracts do not constitute a full waiver of First Amendment rights—and that even as to the CIA agents, for example, in the *Marchetti* case. Finally, the court below attempted to balance contract rights against First Amendment rights and in doing so, we submit, gave undue weight to the contract rights, elevating contract as a theme to the level of a label which bears talismanic immunity —which of course the United States Supreme Court in *New Times v. Sullivan* said no legal theory is entitled to.

This case marks the first time that contract law has been applied to award damages on the basis of oral promises between reporters and sources. There is no compelling precedent in Minnesota to hold that this relationship actually constitutes a contract and in our briefs we have gone through a number of common law rules which would allow the court to find that under these circumstances, it just was not a contract, so that you would not have to reach the First Amendment issues. There are among those grounds the public policy issue as to whether you want to have the courts involved in this sort of regulating agreements between private parties. The legislature, as a matter of public policy, has abolished actions for breach of promise to marry and for alienation of affections. Courts can and have refused to enforce adoption contracts

that would not be in the best interest of the child, as a matter of public policy. We submit that, in this instance, the courts should refuse to enforce reporter and source agreements that are not in the best interests of the public. The public policy at issue here is also embodied in the First Amendment. The First Amendment requires more, much more, than a simple balancing of interests. The government can justify interfering with the publication of truthful information about a matter of public significance only upon a need to further a state interest of the highest order. Here, of course, the information was truthful. It clearly was about a matter of public significance—namely the gubernatorial campaign—and there is no need, in this instance, to further a state interest of the highest order.

Simonett, J.: What weight do you give the fact that the newspaper put a self-imposed restriction of not revealing the source? Doesn't that have to be weighed in the balance, too?

Borger: There is a weight to that, Your Honor, which I submit falls within the professional balaneing at the newspaper. The Minnesota Free Flow of Information Act, the shield law, if you will, creates a privilege for journalists to refuse to disclose the identity of their sources under court compulsion, in most instances; there are some exceptions. The public policy which the statute sets forth at the beginning is: "in order to protect the public interest and the free flow of information." That is not a protection that is given separately to the sources and court cases from around the country which we have cited in our brief—the *Cuthbertson* case, the *Boiardo* case out of New Jersey—hold that the privilege is one that belongs to the journalist and not to the source. Even if the source wants to compel the journalist to talk about it, he can't. The journalist has a privilege to withhold it. The jour-

nalist in the situation in dealing with confidential sources is having to make judgment calls on a very rapid basis as to what information should be withheld from the public in order to obtain other information to present to the public. And the balance is struck in favor of maximizing the flow of information to the public. In most instances, in almost every instance, the journalist who grants confidentiality does so in the belief and the intent that granting confidentiality will increase the flow of information to the public, but it is not something that is granted just for the interests of the source. It is serving the interest of the public in obtaining information and that is the interest that the editors at the *Star and Tribune* and the editors at the *Pioneer Press* were attempting to serve in their decision, difficult as it was, to disclose Mr. Cohen under all the circumstances of this case. The calculus that they went through, as reflected in the testimony at trial, was that by the time they were making their decision the story was already out from the Associated Press about the Marlene Johnson arrests. Ms. Johnson had claimed that this was an attempt at muckraking by the Whitney campaign and the Whitney campaign was saying it had nothing to do with it. The information as to who had disclosed the story to the various reporters was also circulating and had gone to the Whitney campaign by one of Mr. Cohen's colleagues. Mr. Flakne, who was part of the effort to obtain the records in the first place, told a different reporter at the *Star and Tribune* that he had obtained it for Mr. Cohen. The information was coming out from a variety of sources. It would have been really giving the public less than all the information that they needed to assess just where the information was coming from, had they given any sort of veiled reference to some part of the Whitney cam-

paign, because the Whitney campaign was denying it and Mr. Cohen was not an official part of the Whitney campaign.

Simonett, J.: The promise of the confidentiality that you're talking about, did that relate in any way to the information that was conveyed; that is, they were not to reveal anything that was contained in the criminal records about Marlene Johnson?

Borger: No, Your Honor.

Simonett, J.: It just dealt with the source?

Borger: It dealt strictly with the identity . . .

Simonett, J.: I tell you what troubles me. What's newsworthy about revealing Cohen's name?

Borger: The role that Mr. Cohen was playing in this particular effort was to increase deniability by everybody involved. If you go back to the trial court testimony, none of the people who came up with the scheme to disseminate this information about Ms. Johnson wanted anything to do with it, wanted any credit for it. Mr. Flakne is pointing to Professor Ismach and Mr. Cohen, Mr. Cohen is pointing to the other two, Ismach is saying: "it's these guys who were involved in it" when it came to trial. They all realized that there was going to be some backlash to this. The Whitney campaign wanted to deny any involvement but wanted the benefit from having the information spread. What was newsworthy, what the public had to understand, was how close to the Whitney campaign the source of the information had been. It would have been unfair to the Whitney campaign to have said that he was an official part of that campaign, because he was not, although he was working for the campaign through the public relations firm.

Simonett, J.: The paper was free to say that the source was a source close to the Whitney campaign. Is that right? Am I right?

Borger: Your Honor, that is one approach they considered and an approach they rejected, in weighing the editorial balance, because of the ambiguity of that particular term and I submit that what you are doing in this inquiry, just as the Court of Appeals did below, is delving into the editing function at the newspapers when you decide "you could have said this, you could have said that." These are all choices that editors are to make under our system and under the First Amendment, and not for courts to make years after the fact.

Simonett, J.: What was the purpose in publishing Cohen's employer, employer's name?

Borger: Again, Your Honor, it simply was a part of presenting the entire picture to the public. There was no intent, there is no testimony that the publishing of that name was intended to deprive him of his employment.

In terms of the need to further a state interest of the highest order, I submit that there is no need because this is not a widespread problem. This is the only instance in which either of these papers have ever identified a source and there are intense professional pressures to keep the source confidential. Through contract law, Mr. Cohen is asking this court to hold that once a promise of confidentiality has been made, courts will intercede to protect the privacy claim of the source no matter what the public's interest may be in the disclosure. As applied below, contract theory permits no consideration of First Amendment defenses or of the newsworthiness of the information published.

I submit, Your Honors, that the appropriate rule in this case, as in the *Hustler Magazine v. Falwell* case, is that plaintiffs who suffer loss of reputation and related damages due to the publication of information about matters of public significance may not recover without showing the publication

contains a false statement of fact which was made with the required level of fault. Here there was no false statement of fact; your inquiry can end there. But no matter what rule you ultimately adopt, if you recognize any First Amendment interest at all in the circumstances of this case, you must reverse the judgment below, because the trial court gave no consideration to the First Amendment and allowed the jury to give no consideration to the First Amendment. Thank you.

Popovich, C.J.: Mr. Hannah. Might I ask the audience, we've had a lot of people coming and going this morning and I know we have visitors from schools and that and some of the people that were slated to be here couldn't get in. I would ask that there be no more moving in and out until we're through with the case. It's very disconcerting for the justices to be listening at the same time and seeing all this traffic. I would appreciate the audience's cooperation. Okay, Mr. Hannah, you may proceed.

Hannah: Thank you, Your Honor. May it please the court, my name is Paul Hannah and I represent Northwest Publications, Inc., one of the appellants in this case. Mr. Cohen's case below included a claim for fraudulent misrepresentation. The Court of Appeals set aside that claim and also set aside the $500,000.00 punitive damage award which the jury had imposed. I will deal primarily with these issues, although of course, if you have any other questions, I would be more than willing to deal with them.

In order to prove fraud, Mr. Cohen has the burden of affirmatively proving the existence of each of the elements of the cause of action. And one necessary element is that the alleged misrepresentation relate to a past or present fact. This element simply does not exist in this case. The representation involved the reporter's promise that Cohen's name

would not be used in any future article they wrote. This is a promise of a future intention. As such, it cannot be the basis of a fraud action. Otherwise, any broken promise or every disputed contract would also be the basis of a fraud claim. We have cited two cases that I believe graphically demonstrate the significance of this principle. *Hayes v. Northwood Panelboard* and *Maguire v. Maguire*. In *Maguire v. Maguire*, a father promised to leave a two-thirds interest in some property to his children if they settled a lawsuit involving the property. Later, the father bequeathed the property to the children's new stepmother. Because there was no intent to defraud when the promise was made, no fraud claim existed.

In this case, there was no representation of a past or present fact by the reporters. Their promises were of a future intention. There also was no evidence that the reporters planned or intended to break their promises at the time they made them. In fact, Mr. Cohen himself testified that the reporters (1) were truthful; (2) intended to honor those promises; and (3) made no false statements to him during the course of their meetings. In addition, there is no evidence that the editors of the newspapers at the time the promises were made had any intention of any sort with respect to the promises. Mr. Cohen argues that fraud may be inferred in this case from the repudiation of the promises shortly after they were made, and he cites a 1924 case, *Guy T. Bisbee*. But *Bisbee* merely recognizes that it is sometimes difficult to prove the intent of a promissor at the time the promise is made. It is an evidentiary holding. Here, the intention of the participants is not in dispute and it's not in doubt. The reporters had every intention of keeping their promises to Mr. Cohen. Therefore, there is no need to refer to the evidentiary presumption that was set forth in *Bisbee*. Mr. Cohen tries to salvage this

argument by alluding to the short time between the promises and the editorial decisions to publish his name. In the life of a typical news story, these decisions were not unusual and the timing wasn't short. Hundreds of articles, literally, everyday, have lives that span approximately 12 hours. The decisions in this case occurred in the same time frame as the vast majority of those articles. So the timing is not significant. And, again, there is no significant evidence, in fact, there is no evidence, to show that the intention at the time the promise was made was to do anything other than to honor the promise.

Mr. Cohen has several alternative arguments. First, he asserts that agency principles somehow support his claim. But his cases involve situations in which agents made fraudulent misrepresentations which were then imputed to the principals. Here, the agents, the reporters, made no fraudulent misrepresentation. Mr. Cohen also argues that appellants in their support of shield laws and in their support of the protection of First Amendment principles have somehow defrauded him. This position cannot serve as the basis of his claim. First of all, any such representation made five years ago by an editor of the *St. Paul Pioneer Press Dispatch* or three years ago or ten years ago by an editor of the *Star Tribune* is, like the reporters' promises, a representation of a future intent. And, second, appellants' concern, their concern for shield laws is not a representation to Mr. Cohen on which he can rely. And, third, there is absolutely no evidence in the record that Mr. Cohen, in fact, relied on these concerns of the appellants for the rights of sources. In fact, the evidence is that Mr. Cohen was no neophyte in matters of editorial decision-making. The case law is also clear that this privilege belongs to the press. For all those reasons, Mr. Cohen's attempt to balance his fraud case on this kind of representation simply will not succeed.

Finally, Mr. Cohen argues that the reporters misrepresented their authority, and that is not true. The facts in the case are that the reporters had the authority to make the promises they make. Editors were also aware that these promises were made by reporters from time to time in the course of their work. And, in fact, this circumstance that somehow a promise implies the authority to make the promise is true in every case where a promise is made of a future intent. So, for example, I make a promise that I will do something in the future, by the way, is left unsaid, I may break that promise. So to find that there is a basis for Cohen's fraud claim with this argument means again, that any promise, any disputed contract will now be the basis for a fraud claim. There simply is no legal or factual basis for that claim.

And, finally, the issue of punitive damages, again, has no basis in law or in fact. Punitive damages cannot be imposed in a breach of contract action. There is no independent tort and the facts of this case certainly do not provide any evidence of willful, wanton or malicious conduct. Thank you.

Popovich, C.J.: Mr. Rothenberg?

Rothenberg: Thank you, Your Honor. May it please the court, my name is Elliot Rothenberg. I represent plaintiff and respondent Dan Cohen in this action. I would like to respond to the arguments posed by appellants in the following order: First, to take the fraud and misrepresentation claim addressed by Mr. Hannah and then the contract and First Amendment issues raised by Mr. Borger. First, just as an introduction, however, I would like to point out that there are many factual disputes in this case that were resolved by the jury in Mr. Cohen's favor. For example, the claim that Mr. Flakne had told a reporter named Mr. Anderson something about what Mr. Cohen had done, aside from the promise given by the

reporters. This was rejected by the jury and we would submit that it is far too late to re-try these factual issues before this court. In addition, defendants had throughout the case, at least in the trial, concentrated on attacks on Mr. Cohen's character and motives, alleged character motives in presenting this information to reporters and, again, this was rejected by the jury, and, in fact, there was considerable evidence before the trial that the reporters had welcomed this information. There was an editorial in the *Pioneer Press Dispatch* saying that the information provided by Mr. Cohen was relevant, that the campaign itself should have presented this information and that too much was being made of the source of this information. So we would submit that these issues have been already resolved by the jury in Mr. Cohen's favor and ought not to be re-presented to the Supreme Court. In addition, the standard for review of special verdicts and judgments NOV, that all the presumptions have to favor what the jury had done and also the trial court in rejecting the petition for judgment NOV, and, consequently, as far as the fraud and misrepresentation claim is concerned, that the presumption should be in favor of the jury verdict and in favor of Judge Knoll's rejection of the motion NOV, and not in favor of the decision of the Court of Appeals overturning the verdict on misrepresentation and by extension of punitive damages.

We would submit, Your Honors, that the flaw of the Court of Appeals' decision regarding fraud and misrepresentation was the failure to address the substantial evidence relating to the misconduct of the editors and employers of the reporters in this case. It may well be true that the reporters did have the intention of keeping their promises to Mr. Cohen when they had agreed to his condition of confidentiality prior to his presenting the court documents to them. What's critical

here ought to be not the intentions of the reporters, who in fact had no power to carry out their promises, but rather the intentions of the editors, Mr. Hall, the executive editor of the *Pioneer Press Dispatch* who made the decision to identify Mr. Cohen, and Mr. Finney of the *Star Tribune* who made the same decision. Mr. Hannah said that not every breach of promise, not every breach of contract is misrepresentation or fraud. There's no question about that. However, a breach of contract and a breach of promise can be fraud when one, there was never any intention on the part of the parties agreeing to the contract to honor and abide by the contract and, two, where there is a misrepresentation, one or more misrepresentations, misstatements of fact and we would submit that both applied in this case. The evidence is very clear on the part of the *Pioneer Press Dispatch* and Mr. Hall was commendably candid on the issue. What did he say? He said that as soon as he learned of the promise given by Mr. Salisbury to Mr. Cohen, he decided right on the spot, basically, to identify Mr. Cohen, to name Mr. Cohen in the *Pioneer Press Dispatch* article. In fact, he said on direct examination from his own attorney, Mr. Hannah, he testified that he had never considered it, never considered doing any other way than identifying Mr. Cohen. And, he and Mr. Salisbury's direct supervisor, Doug Hennes, testified that he made the decision without even consulting with Mr. Salisbury and without even considering the pros and cons of the matter. So the evidence is clear that the *Pioneer Press Dispatch* editor, the person who had the power to decide whether or not to identify Mr. Cohen, decided immediately, never had any intention of abiding by the promise of his reporter Mr. Salisbury to Mr. Cohen. And the same applied to the Minneapolis *Star Tribune* as well. The *Star Tribune* claims that they reached a decision after some time

of consideration among the editors. There is much conflicting testimony on this point, I should point out, for example, there is evidence that they reached the decision in considerably less time than they claim to. But, perhaps, what is most important that in his testimony, Mr. Finney testified that he had never made a decision to honor the promise. The first and only decision he ever made on this issue was to identify Mr. Cohen and dishonor the promise made by his reporter Ms. Sturdevant to Mr. Cohen. Now, in the cases cited by Mr. Hannah and to certain extent by Mr. Borger as well, these cases indicate that there is fraud or misrepresentation when (1) there is no intention to honor the contract and (2) when the contract, the promise, is basically not made in good faith on the part of the party making the promise. Here, the Court of Appeals did not find any good faith on the part of appellants' editors in breaking their promises to Mr. Cohen. And, we would submit, that the anger and the opposition on the part of the reporters to the dishonoring of their promise, far from showing good faith on the part of the appellants who broke the promises, only accentuates the lack of good faith on the part of the editors who broke these promises. Now, it would have been one thing, if the editors had decided that the reporters should not have made the promises to Mr. Cohen and said, well, you shouldn't have made the promise to Mr. Cohen, we're not going to run the story, give the documents back to Mr. Cohen and forget about the whole thing. However, the court should not allow the appellants, should not create a precedent allowing these appellants to use reporters to obtain and secure full performance on the part of another party, the other party to the agreements and then to claim that the same reporters did not have the authority to carry out their own obligations, which is basically what happened here. And, incidentally, the re-

porters were not only given the authority to secure the obligation, to secure the performance of Mr. Cohen, but when the editors decided to dishonor the promise to Mr. Cohen they then dispatched the same reporters to try to get Mr. Cohen to withdraw from the agreement, particularly on the part of Ms. Sturdevant. Ms. Sturdevant called Mr. Cohen once, asked Mr. Cohen, will you give us consent to run your name despite the promise that we'd given you. Mr. Cohen said no. Ms. Sturdevant called him a second time, said my editors wanted me to call you again to see if you'd give the consent to withdraw from our agreement with you. Mr. Cohen again said no. She may have called even a third time. So, even after the request, Mr. Cohen said no, they still decided they were going to run his name and identify him as the source. And, the *Pioneer Press Dispatch* also instructed Mr. Salisbury to call Mr. Cohen and to inform Mr. Cohen of the decision of the editors and Mr. Cohen objected to that as well and still they ran his name. So we would submit, Your Honor, that the critical intention here that was overlooked by the Court of Appeals was not the intention of the reporters. The reporters may well have wanted to keep their promises, but when they went back to their editors, the editor says no, for the first time, as Mr. Borger admitted, for the first time, we are going to say that you do not have the authority to carry out your promise of confidentiality to a person to whom you made the promise.

Simonett, J.: Do you agree that the reporters had every intention of carrying out their promises at the time they made them?

Rothenberg: Your Honor, the evidence does indicate that, yes. The evidence indicates that the reporters did have the intention, did act in good faith. We would submit, that the

reporters according to the evidence would have agreed to do this, would have had the intention.

Simonett, J.: Is there any evidence that the reporters at the time they made their promises knew or should have known that the editors would not back them up?

Rothenberg: Your Honors, we would submit that the reporters should have known of any policies. In fact, this is one of the issues at the trial level where trial counsel for appellants at that point, claimed that the reporters did not in fact have the authority and that they should have gotten approval of the editors before making the promise. Now, they seem to have abandoned that position at this level. But, we would submit that, regardless of whether the reporters knew or not, that there is duty owed to inform Mr. Cohen. In fact, what Mr. Cohen testified is that when he talked to the reporters, he relied on what he thought was their authority to bind the newspapers, that if he had known that the reporters could not by their own actions bind the newspapers, he wouldn't have given them the information or he could have gone to an editor, Mr. Finney or Mr. Hall, but basically, he said that had he known that the reporters could not bind the newspapers by their own promise, had he known that editors could revoke promises of confidentiality, he would not have dealt with the reporters, he would not have accepted their promises. And . . .

Coyne, J.: Counsel, isn't this argument antagonistic to your contention that there was a contract here? Sounds to me as if you're saying there was never any meeting of the minds.

Rothenberg: No, Your Honor, and let me explain why it's been our position that the reporters did have the authority to make the promises, the actual authority as pointed out in the Court of Appeals and certainly the apparent authority to make

these promises, that this has been going on, that these promises are made quite frequently, promises of confidentiality. In fact, Ms. Sturdevant testified she makes these promises once a week. Mr. Salisbury testified that he makes them quite frequently. There was substantial testimony on the part of editors and reporters that this is one of the major ways in which newspapers obtain information, is by promising confidentiality to sources in order to obtain information. And, notice in the reply brief of Mr. Borger there is a reference to the latest edition of Gillmor and Barron's Mass Communication Law 1990 edition and on page 394, where he cited some information on this case, Gillmor and Barron says that anonymous sources account for 30% to 50% of news gathering. So, we would submit, that there was indeed the authority and certainly the past practice of obtaining information by means of promising confidentiality, and that both reporters testified that is the very first time in their long careers as reporters that any promise of confidentiality had ever been revoked by an editor.

So we would submit there, Your Honor, that there indeed was the authority, that the past practice, and that gets into the second part of the misrepresentation issue as well. And that is, that through the past practices and representations that appellants held out their reporters as having authority to bind them unilaterally by promises of confidentiality. There was considerable testimony that obtaining news by promises of confidentiality is a way of business, a way of life of newspapers and indeed, the media generally, and that many, many stories are obtained through confidential sources, including stories regarding political candidates, that this is a way of life, of the newspapers. In fact, Dean Ismach of the University of Oregon School of Journalism testified that it's a sacred

trust that, once a reporter makes a promise of confidentiality, that reporter speaks for the news organization and is a sacred trust to honor those promises. In fact, in the brief before the Court of Appeals, Cowles Media again referred to it as a sacred duty that once the promise is made that these promises have to be honored, that's far more than a mere contract. And, the editor of the *Pioneer Press Dispatch* at the time John Finnegan in an editorial written about a year before the situation arose which is at the heart of this lawsuit, said that the violation of a promise of confidentiality would be "a dirty trick," those were his words, it would be "unscrupulous," that was his word, it would show "no concern for fairness and integrity," again his words, and he said that he would not hire someone who would do such a thing, and that's exhibit 76, is a column of October 4, 1981. And, in addition, the appellants have pushed for the adoption of shield laws like the Minnesota Free Flow of Information, which basically protect the rights of reporters not to have to identify their confidential sources in response to court orders—another way of encouraging sources to provide confidential information to them. All this is part of what is called the golden rule of investigative reporting as testified to by Linda Cole, who is a reporter for the *Pioneer Press Dispatch*, that once you promise a source of information confidentiality, you do not betray that promise. In addition, the appellants have written many articles and editorials, they have been submitted as evidence, condemning judges who have ordered reporters to disclose their confidential sources and have sent reporters to jail for refusing to disclose these confidential sources. That all of these we would submit, Your Honors, are part of a representation of past practice to any confidential source, including Mr. Cohen, that once a promise is given of confidentiality that promise is

going to be honored and that the public ought to have the right to rely on these representations and that if this representation is violated—the very first time this has happened, certainly by these newspapers—and that that ought to constitute fraud and misrepresentation on their part, and if the appellants do not intend to keep such agreements, do not intend to allow reporters to make them, they have the duty and obligation to inform the public that these promises of reporters are subject to review by editors and that sources deal with the reporters at their own risk. None of this was done in this case. Perhaps, Your Honors, I could now go to some of the First Amendment issues unless there are any questions from the court on this issue and here I would like to . . .

Wahl, J.: Counsel, before you go on. Why shouldn't this decision as to whether a promise is honored or not be an editorial decision, rather than a decision of the court?

Rothenberg: No, Your Honor, we would submit that it should not and the reason is that this would create a privilege for newspapers which no one else in society has. That when an agent makes a promise on behalf of a principal, the principal has the obligation to honor that promise. That applies to anyone else in society, any other business or institution in society and that newspapers ought not to have the right, the only institution in society, ought not to have the right to dishonor and violate promises which were voluntarily entered into.

Wahl, J.: But the public interest that's involved to me, the greater public interest than even possibly individual contract rights, is the right of the public to have accurate information and, particularly, to have information with regard to their elective processes. And why isn't it against public policy to say that you can enforce such a contract, if indeed it is a contract?

Rothenberg: Let me respond in this way, Your Honor. This is not the first time that a newspaper has obtained information on a candidate in response to a promise of confidentiality. The substantial evidence, has been done in many, many other cases, for example, where promises were honored. Case involving Geraldine Ferraro's parents where information was given on a confidential basis. Forty years earlier her parents had been convicted on some gambling charges. There was confidential information late in political campaigns on Governor Wendell Anderson, leaking of a report where the appellants had congratulated themselves on obtaining this information. There was information on Senator Joseph Biden in committing plagiarism 20 years earlier. There was a long article on civil lawsuits against Robert Mattson obtained from confidential sources, all this just a few days before the election. And, we would submit, that in this case, Your Honor, all that Mr. Cohen provided the reporters with copies of court documents.

Wahl, J.: Counsel, there are other ways in which he could have gotten those into the hands of the reporters, aren't there? He chose to have himself identified with the giving of the information.

Rothenberg: Your Honor, he did demand the promise of confidentiality before he would give the information. And the reason he did this rather than slip them under the door or something of that sort, was that he felt that once a promise of confidentiality was given, that the reporters and the institutions who gave those promises could be trusted and we would submit that a person does have the right to trust that promise and a contract once made will be honored and enforced by the courts, if necessary.

Simonett, J.: Let's take up your contract theory. For how long would this promise have to be kept, under this contract?

Rothenberg: The promise was not, the contract, of course, did not specify the period of time. However, however long it should have been kept, certainly it should have been kept longer than the few hours or the few minutes it took appellants to violate that contract.

Simonett, J.: Let's say, then, sometime thereafter, KSTP Channel 5 approached Mr. Cohen and said were you the one who released that information and he said no—which would be untrue. Could the St. Paul or Minneapolis newspapers, would they then be released of their promise of confidentiality?

Rothenberg: Your Honor, we would submit, that in terms of this contract, they would not be released, if that should take place. The contract clearly provided, in fact, there's no question here as to the wording of the contract, that they would not disclose the name of the person who gave them this information.

Simonett, J.: Would the law then be being used to support deceit by a contracting party?

Rothenberg: We submit that in this case, nothing like this ever happened, Your Honor. Mr. Cohen has never been accused of lying to any news organizations, the appellants or any other one. So, but in that hypothetical situation, which of course does not exist here, I think one would have to look at the circumstances, but I would submit that just on these facts, that if the person gives information on a confidential basis, he does not want to be identified, he fears the loss of his job, he fears other retaliation if he is identified, that he ought to have the right not to be linked with that information, but. . . .

Simonett, J.: All right, now one other question. I know the time is getting short. If the Minneapolis newspaper learned

that Cohen was the source or was told that Cohen was the source of the information independently of the transactions. . . . Once it had learned from Mr. Flakne that he had given the information to Mr. Cohen, did that release it from the promise, as a matter of contract?

Rothenberg: Your Honor, if I could address first about the part about Mr. Flakne. Mr. Flakne in the trial denied that he had said anything of the sort to the *Star Tribune* reporter, Mr. Anderson. And, Mr. Anderson said that he had written something to that effect, that Mr. Flakne had told him, but that never made its way into the final article. So we would submit, Your Honor, that the jury was entitled to find that Mr. Flakne in that disputed, with those disputed facts, that Mr. Flakne had never told anyone at the *Star Tribune* that Mr. Cohen was distributing this information. And, indeed, Ms. Sturdevant indicated in her own testimony that there was no other independent information linking Cohen to the information either. But, I'm sorry, Your Honor. . . .

Simonett, J.: The light is red. I wonder if you could just give me a very quick answer on the other part of the question?

Rothenberg: On the hypothetical part of the question?

Simonett, J.: Yes.

Rothenberg: Just hypothetically speaking, we would submit that that once the promise is made, that the newspaper has willingly made an agreement in order to obtain information and they ought to be held to their contracts, that, again, they are demanding a right possessed by no one else in society, the right to make contracts, the right to obtain full performance on the part of the other party to contracts, and then the right to unilaterally dishonor their own agreements. And, we submit that there is no precedent for this, that the appellants are really asking for the unprecedented decision here to free

them from the law of contracts which binds everyone else in society and that's why we say that general contract law ought to apply here, that the appellants have no First Amendment right, ought to have, ought to be given no right purportedly under the First Amendment to be above the law. My time is up, I believe. Okay. Thank you.

Popovich, C.J.: Rebuttal.

Borger: Let me address some of the questions that Justice Simonett put to Mr. Rothenberg. First, as to the law being used to support deceit as to a contract action, that in fact could have happened in the *Newsweek* and Oliver North situation. You recall that *Newsweek* identified Mr. North as the source of certain information about a raid on Libya after Mr. North had accused Congress of leaking like a sieve and being untrustworthy to obtain security and classified information. *Newsweek* did that because Mr. North was being hypocritical and they burned that source on that basis. Had Mr. North brought such a contract action here, contract law would be used to support a deceitful activity by a public official. We are not claiming, as Mr. Rothenberg would have you say, that this is a privilege that applies only to the press, as contract law not applying in this sort of mutual promise situation. There are all sorts of personal situations in which someone comes up and says I know something about somebody and if you promise not to tell anybody, I'll tell you what that is. If someone breaks that in the backyard gossip situation, are you going to have a contract cause of action in that situation?

Simonett, J.: This is more than backyard gossip, though, this is, don't you think, it's within the business of newsgathering between the source and the reporter?

Borger: Your Honor, under the *Florida Star* situation, if the interest of the source of the information in keeping that confidential is to be protected, you would have to extend it to the backyard gossip situation, too, because you can't have a rule that applies just against the press. *Florida Star* also makes the point that it would be a perverse result that truthful publications challenged pursuant to a particular cause of action—there, a privacy statute, here, a contract—are less protected by the First Amendment than even the least protected defamatory falsehoods.

Yetka, J.: Doesn't that depend a little upon what the practice has been? The question here is, is whether there was an expectation that if a promise was made by a reporter, it would be kept. Now, is it your position that there was no past practice to that effect, that there was no binding right of a reporter to assure a source of confidentiality. It seems to me that's one thing; if there was such a policy, that's another. Was there or was there not such a policy?

Borger: Your Honor, clearly it was past practice of the papers to recognize promises of confidentiality and to keep them, as a matter of professional ethic, not as a matter of contract law. If this had been perceived as a matter of binding contract at the newspapers, then they would have gotten around the problem as Justice Simonett suggested; once Gary Flakne revealed that Cohen was his source to Mr. Anderson, they would have used Mr. Anderson's version in the publication.

Yetka, J.: But then how was the public, how was the public to know that that was merely an ethical rule and not a binding practice?

Borger: Your Honor, as a matter . . .

Yetka, J.: It's obvious to all of us that if there were such a practice, and people rely upon it, that this case has sure done a lot to destroy that kind of confidence. And so, I suppose that—and there hasn't been much discussion on the part of any of the attorneys of this case as to whether if there had been even a practice, a custom in the trade—that there could be an equitable estoppel of some kind to protect people who give this information to a newspaper reporter with every indication that it was never going to be used, that the source would never be used. Now, that's a little different than an outright contract, but there are equitable estoppel cases, and it hasn't even been discussed.

Borger: No, it hasn't been discussed, Your Honor. And, I do think that it is a matter of professional ethic rather than law. It is a matter of professional ethic that brings newspaper reporters and editors to go to jail rather than obey a court order to disclose a confidential source. What kind of a contract requires one of the parties to disobey the court? This is something that is extracontractual, and I agree with Mr. Rothenberg that it approaches a sacred trust, but that puts it into the realm of personal obligation, not legal obligation. Under *Seattle Times v. Rhinehart*, the United States Supreme Court case that dealt with confidential restrictions on information obtained through the discovery process, the court was very careful to say that that restriction applies only to the extent you obtain the information through discovery. If you get the information from some other manner, the First Amendment keeps the court from forbidding disclosure of that same information. And I think the same situation would apply here. If you got into strict contract analysis, once David Anderson obtained the information from Gary Flakne, the contract wouldn't fly. But the editors weren't

looking at it as a matter of contract law and that's why they asked Mr. Cohen to waive his promise. They were looking at it as a matter of professional ethic and professional responsibility. They should be punished, if they are going to be punished, because of criticism from their fellow professionals, because of distrust from the public, as a matter of professional ethic, not as a matter of law which brings the courts into determining, not just in this case what the promise actually was, but if you follow your proposal, Justice Yetka, equitable estoppel gets into a very amorphous ground and would have the court and the jury deciding just exactly what the practice was, because it varies from paper to paper. Where exactly do we draw the parameters of this right on behalf of the source? And just how intrusive are we going to have the courts be into the editorial process? Thank you, Your Honor.

Popovich, C.J.: Mr. Hannah?

Hannah: Thank you, Your Honor. From the point of view of the question of fraudulent misrepresentation, I would first of all like to direct the court to our discussion of the facts in the briefs. I think that you will find a circumstance involving the editors of both newspapers quite different from that which was represented to you by Mr. Rothenberg. In point of fact, at the *Pioneer Press Dispatch*, there was a policy that a reporter should seek to consult with an editor before making a promise of confidentiality, that given the practical effect of the reporters' interaction with their sources, that policy, that if possible the reporter should approach the editor, was a policy which was sometimes followed and which sometimes could not be followed. And the evidence was clear that editors were aware that the peculiar circumstances of the interaction between reporters and their sources would mean that the promise would be made many times without prior discussion

with an editor. And, I think, Mr. Justice Yetka, that that is a particular answer to your concern.

Yetka, J.: Well, the only problem with it, is this: that it's obvious from the arguments and these briefs that Mr. Cohen was very sophisticated in dealing with the press. As a matter of fact, he's dealing in public relations at this time.

Hannah: And was then.

Yetka, J.: And yet he thought there was a policy that if he was guaranteed confidentiality that that would be kept. Now, we're being told that was not a policy, it varied from newspaper from newspaper and he was not entitled to rely on it. Now, if a man as sophisticated as Cohen relied upon it, what would be the attitude of an ordinary citizen who, fearful of his or her job, offers information that might be helpful in disclosing fraud in government or something else, and being faced with the situation that was presented here by having their names disclosed?

Hannah: I think that you raise a question that we've had to deal with on a professional level, that our clients have had to deal with, since this case. I don't believe that the position of these appellants or of the press, or protestations of reliance by Mr. Cohen, who knew to a large extent what he was getting into, means that suddenly a fraud cased appears where in fact the practice up to this particular circumstance had been that those promises would be honored.

Yetka, J.: And yet the newspaper contacted him at least twice to see that if he would consent?

Hannah: That's correct.

Yetka, J.: So at least he had some indication that his understanding of the policy was correct, that confidential information sources would not be disclosed and he denied them that right, and apparently relied upon his assumption as to what

the rule was. Now we're being told it's an editorial right, the reporters had no right to make those commitments. If there was such a, my point is, if there was such a policy, it seems to me—whether there is fraud or not, that's a separate question—but, if there was such a policy that there's at least some basis for a contractual obligation, whether based on equitable estoppel or something else, that he was entitled to rely on that commitment.

Hannah: Your Honor, what I would posit is this: the circumstances of this case, the first case in which either one of these appellants has broken a promise, were such and the testimony was such that the editors felt under all the circumstances—and again, we've outlined those circumstances in the brief—that they were required to name Mr. Cohen in order to provide the voters with accurate information some six days before the election. That particular circumstance is the only one now before the court. I understand the court's concern and my point is, is simply that a contract or fraud in the circumstances, in the peculiar circumstances, of this case can't simply be determined by what the past practice was. That if we're going to start to look at the relationship between Mr. Cohen and the *Pioneer Press Dispatch* and the *Star Tribune* to determine legal responsibilities, then we have to look at them all. And our argument to this court and to the Court of Appeals, in fact to the trial court, was that the only way to look at all those circumstances, including the past practice, was to look at it in the context of the editorial decision being made by the people at the *Star Tribune* and the *Pioneer Press Dispatch*, the circumstances and their understanding of their obligation under the First Amendment. And we weren't able to argue that. I recognize your concern, and my point simply is that if you begin to look at our practice,

then I think you have to look at that practice in the context of our exercise of not only First Amendment rights, but also the obligation that we have and that we've tried to delineate in our brief to make sure that people aren't given veiled sources if those editors firmly believe that some information is going to be provided to those people and it won't be accurate. Those editors, for example,—I'm sorry, thank you, Your Honor.

Popovich, C.J.: Very good discussion by both parties today. I should make that announcement.
